SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. 533

TORAO TAKAHASHI

vs.

FISH & GAME COMMISSION

BRIEF OF AMERICAN VETERANS COMMITTEE (AVC)

Amicus Curiae

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April 12, 1948.
Washington, D. C.

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This case involves the validity of a State statute the effect of which is to deny to lawful residents of the State the right to work for a living in a common occupation, solely because of their race and ancestry.

The Interest of the American Veterans Committee

The American Veterans Committee (AVC) is an organization of veterans of World War II who have associated themselves, regardless of national origin, creed or color, to promote the basic aims for which they fought. AVC's basic aims are set forth in the Preamble to the AVC Con-

stitution adopted at its First National Convention at Des Moines, Iowa, June 14-16, 1946:

> "We as veterans of the Second World War associate ourselves regardless of national origin, creed or color for the following purposes:
>
> "To preserve the Constitution of the United States; to insure the rights of free speech, free press, free worship, free assembly and free elections; To provide thorough social and economic security to all; To maintain full production and full employment in our country under a system of private enterprise in which business, labor, agriculture and government cooperate; To promote peace and good will among all nations and all peoples; To support active participation of this nation in the United Nations and other world organizations whose purposes are to improve the cultural, commercial and social relations of all peoples; To provide such aid to disabled veterans as will enable them to maintain the position in society to which they are entitled; To provide such financial, medical, vocational and educational assistance to all veterans as is necessary for complete readjustment to civilian life; To resist and defeat all attempts to create strife between veterans and non-veterans; and To foster democracy. We dedicate ourselves to these aims, and for their attainment we establish this Constitution."

Any statute which denies to lawful residents, solely because of their race or ancestry, the right to work for a living in a common occupation, as does the statute involved in this case, adversely affects AVC's basic aims. AVC's present platform adopted at the Second National Convention in June, 1947, at Milwaukee, Wisconsin, reiterates our determined opposition to "any laws, practices, customs, and usages whereby any person or group by virtue of discrimination due to race, religion, color or sex" is prevented "from obtaining employment" (Plank 149) and our support of "legislation to guarantee fair employment practices

and to provide equal job opportunities" (Plank 150). *The AVC Bulletin*, "AVC Platform Supplement," Vol. 2, No. 11, p. 4 (August 1947). (National newspaper of AVC). For these reasons, AVC files this brief as *amicus curiae* urging this Court to hold that section 990 of the California Fish & Game Code is invalid insofar as it denies to lawful residents of California, because of their race and ancestry, the right to work for a living in a common occupation.

The Facts

The petitioner, Torao Takahashi, was born in Japan, of Japanese ancestry. He immigrated lawfully to the United States more than 40 years ago and has been a lawful resident of California since 1907. From 1915 to 1942, under annual licenses issued to him by the California Fish & Game Commission, he worked continuously and exclusively as a commercial fisherman. In 1942 he was evacuated from California by the Army along with all other persons of Japanese ancestry. Upon his lawful return to California in 1945 he again applied to the Fish & Game Commission for a commercial fishing license. The license was denied solely because he had been born in Japan of Japanese ancestry and was therefore a "person ineligible to citizenship" under the naturalization laws of the United States (8 U. S. C. 703) to whom the issuance of a license was forbidden by section 990 of the California Fish & Game Code, as amended in 1943 and 1945. He has been unable to secure other employment. He has two sons and two sons-in-law who are American citizens by birth and who have served in the Armed Forces of the United States (R. 1, 2).

Section 990 of the California Fish & Game Code requires "every person who uses or operates or assists in using or operating any boat. . . . to take fish. . . . for profit" or who brings fish ashore "at any point in the State for purpose of selling the same," to procure a commercial fishing

license. Such a license "may be issued to any person other than a person ineligible to citizenship." A license may also be issued to any corporation authorized to do business in California "if none of the officers or directors. . . . and if less than the majority of each class of stockholders thereof are persons ineligible to citizenship." Fishing without a license is a misdemeanor. Section 1410, California Fish & Game Code.

The Superior Court of California in and for the County of Los Angeles held that section 990 was unconstitutional (R. 11-18) and ordered the Fish & Game Commission to issue a commercial fishing license to the petitioner (R. 21). The Supreme Court of California, by a 4 to 3 decision, reversed. R. 30-53; 30 Adv. Calif. 723, 185 Pac. (2d) 805 (1947). This Court granted certiorari on March 15, 1948.

ARGUMENT

I. The Prohibition in Section 990 of the California Fish & Game Code Against the Issuance of a Commercial Fishing License to Lawful Residents of California Who Are "Ineligible to Citizenship" Unconstitutionally Deprives Them of the Right to Work for a Living in a Common Occupation Since the Prohibition Is Based on Racial Discrimination and on an Arbitrary and Unreasonable Classification.

This Court has held that a State may not "deny to lawful inhabitants, because of their race or nationality, the ordinary means of earning a livelihood. . . . It requires no argument to show that the right to work for a living in the common occupations of the community is of the very essence of the personal freedom and opportunity that it was the purpose of the [Fourteenth] Amendment to secure." *Truax* v. *Raich*, 239 U. S. 33, 41 (1915). This Court has also held that a State may not, solely because of race or

ancestry, deny to some persons any right or privilege offered to other persons. *Missouri ex rel. Gaines* v. *Canada*, 305 U. S. 337 (1938); *Sipuel* v. *Board of Regents*, 332 U. S. 631 (1948).

A. The Purpose and Effect of the Statute Is Racial Discrimination

The legislative history of section 990 conclusively demonstrates that its sole purpose and effect is to discriminate against alien Japanese lawfully resident in California. When first enacted in 1909 (Calif. Stats., 1909, ch. 197, p. 302), the law authorized issuance of fishing licenses to any person upon payment of a license fee of $2.50 by a citizen and $10 by a non-citizen. Under the 1917 amendment (Calif. Stats., 1917, ch. 533, p. 686, 687), any person could secure a commercial fishing license upon application and payment of $10. In 1933, this law was codified as section 990 (Calif. Stats., 1933, ch. 73, p. 394, 479). Less than two months after the codification, section 990 was amended to prevent the issuance of a license to any person who had not "continuously resided within the United States for a period of one year immediately prior to. . . . application for such license" (Calif. Stats., 1933, ch. 696, p. 1784). This restriction was held unconstitutional in *Abe* v. *Fish & Game Commission*, 9 Calif. App. (2d) 300, 49 P. (2d) 608 (1935). But after all persons of Japanese descent were evacuated from California and other western States by the Army in 1942, section 990 as amended to single out "alien Japanese" as the only persons not qualified for a license. Calif. Stats., 1943, ch. 1100, p. 3039, 3040. In 1945, a Committee of the California Senate, created "to investigate the questions of Japanese resettlement involving the relocation of Japanese internees and evacuees," indicated that the singling out of "alien Japanese" was unconstitutional and recommended "that this legal question . . . be eliminated by an amend-

ment . . . which would make it apply to any alien who is ineligible to citizenship." *Report of the Senate Fact-Finding Committee on Japanese Resettlement, May 1, 1945*, p. 5 (Calif. State Printing Off., 1945). In accordance with this recommendation, section 990 was amended by substituting "person ineligible to citizenship" for the phrase "alien Japanese." Calif. Stats., 1945, ch. 181, p. 659, 660.

This change of label was but an attempted veil to obscure the racism of the statute. It was not made to further the conservation of fish or primarily to reach the insignificant number of persons in California, other than those of Japanese ancestry born outside the United States, who were ineligible to citizenship. The Senate Fact-Finding Committee, the Report, and the 1945 amendment were concerned only with the Japanese aliens who were being resettled from the relocation centers and with the likelihood that the 1943 statute would be declared unconstitutional. The attempt of the Supreme Court of California to construe section 990 as non-racist in purpose by holding that the Senate Fact-Finding Committee represented "the opinion of only a few of the legislative body and cannot, with any certainty, be said to express the intention of the legislature as a whole" (R. 40; 185 P. (2d) 805, 813) patently distorts the fundamental canon of statutory construction that the reports of the legislative committee are relevant to determine the legislative intent. *Harrison* v. *Northern Trust Co.*, 317 U. S. 476 (1943). The amendment effected no real substantive change. It was a transparent effort to apply the same discrimination, but by circumlocutionary description instead of by name. The statute remained essentially racist in purpose and impact and continued to single out aliens of Japanese ancestry in denying to them, while permitting to all others, the right to work for a living in the common occupation of commercial fishing. *Cf.* D. O. McGovney, "The Anti-Japanese Land

Laws of California and Ten Other States," 35 Calif. L. Rev. 7, 43-47, 51-52 (March 1947).

The opinions of this Court establish that freedom from racial discrimination by governmental power is a field specially protected under our Constitution. *Yick Wo* v. *Hopkins*, 118 U. S. 356, 374 (1886); *Steele* v. *Louisville & Nashville R. Co.*, 323 U. S. 192, 203, 208 (1944); *Smith* v. *Texas*, 311 U. S. 128, 130 (1940). It has been said that statutory restrictions against a racial group, which "never can" be justified by "racial antagonism," may sometimes be justified by "pressing public necessity" such as the threat of imminent military invasion in 1942. *Korematsu* v. *United States*, 323 U. S. 214, 216 (1944). But in this case it is clear that "there is absent the compelling justification which would be needed to sustain discrimination of that nature." *Oyama* v. *California*, 332 U. S. 631, 640 (1948). The guise here adopted by California cannot, therefore, withstand the withering flame of the Constitution against such racial discrimination by governmental authority—the Constitution "nullifies sophisticated as well as simple-minded modes of discrimination." *Lane* v. *Wilson*, 307 U. S. 268, 275 (1939); *Yick Wo* v. *Hopkins*, 118 U. S. 356 (1886); *Yu Cong Eng* v. *Trinidad*, 271 U. S. 500, 525-527 (1926); *Buchanan* v. *Warley*, 245 U. S. 60 (1917); *City of Richmond* v. *Deans*, 37 F. (2d) 712 (C.C.A. 4th 1930), *aff'd* 281 U. S. 704 (1930); *In re Ah Chong*, 2 Fed. 733, 6 Sawy. 451 (C.C., D. Calif. 1880); *Brotherhood of Locomotive Firemen* v. *Tunstall*, 163 F. (2d) 289, 293 (C.C.A. 4th 1947), cert. den. 332 U. S. 841 (1947).

B. The Distinction Between Persons "Eligible" and Persons "Ineligible" to Citizenship Rests upon an Arbitrary and Unreasonable Classification Insofar as the Regulation of Commercial Fishing Is Concerned.

Even assuming *arguendo* that section 990 is not racist in character and is not intended to effect a discrimination on the basis of race, the prohibition against the issuance of commercial fishing licenses to persons "ineligible to citizenship" still runs afoul of the 14th Amendment. We need not here argue the question whether the State of California may constitutionally regulate the taking of free swimming fish from the ocean waters of the three-mile belt adjacent to the coast of California and from the waters of the high seas beyond that three-mile belt (compare *United States* v. *California*, 332 U. S. 19, 36-38 (1947) with *Toomer* v. *Witsell*, No. 415, U. S. Sup. Ct., Oct. Term, 1947, argued January 13, 1948). Even if California may constitutionally regulate the fishing here involved, the 14th Amendment prohibits the State from making arbitrary and unreasonable classifications. The "ultimate test of validity" of a classification is whether it has a fair and substantial relation to the object which the legislation seeks to accomplish—whether the statute has a rational basis—"whether the differences . . . . are pertinent to the subject with respect to which the classification is made." *Asbury Hospital* v. *Cass County*, 326 U. S. 207, 214 (1945); *Sage Stores Co.* v. *Kansas ex rel. Mitchell*, 323 U. S. 32 (1944); *Metropolitan Casualty Ins. Co.* v. *Brownell*, 294 U. S. 580, 583 (1935); and see *Pfeiffer Brewing Co.* v. *Bowles*, 146 F. (2d) 1006, 1007 (E.C.A. 1945), *cert. den.* 324 U. S. 865 (1945). Section 990 cannot meet this test.

Under this statute all persons who fish for profit or who bring fish ashore for sale must secure a license from the State. Licenses are available to *any person in the world*

except one class of persons—aliens ineligible to citizenship. The object of this prohibition is said to be conservation of fish. Yet it does not seek to control the amount of fish taken, nor would it do so since the needs of the market will in fact be met by the capture of fish by others than the restricted class, and hence no conservation purpose can possibly be served by the classification. Thus it is clear that the distinction made between aliens ineligible to citizenship and other classes of persons is not relevant to the conservation of fish. The prohibition against alien Japanese will not help the State to conserve fish—the purported aim of the statute. It will merely effect a gross economic discrimination against a racial group of lawful residents, and as such is an arbitrary and unreasonable classification within the meaning of the 14th Amendment. This is emphasized by the fact that although persons ineligible to citizenship are forbidden to engage in commercial fishing, any person, including a Japanese alien, may secure a license for *sport* fishing. Section 428, Calif. Fish & Game Code, as amended by Calif. Stats., 1947, ch. 381, pp. 941, 942, ch. 1329, pp. 2884, 2885.

In its decision below, the Supreme Court of California stated (R. 38; 185 P. (2d) 805, 812):

> "In many decisions the courts have upheld a classification of persons by which nonresidents and aliens were denied hunting and fishing privileges. In so far as conservation is concerned, it is just as reasonable to classify aliens upon the basis of eligibility to citizenship."

We need not here be concerned as to the question whether a State may constitutionally discriminate between citizens and aliens in prescribing who may or may not take fish for their own use or pleasure from waters within its jurisdiction (compare *Patsone* v. *Pennsylvania*, 232 U.S. 138 (1914)

(hunting) and *McCready* v. *Virginia*, 94 U. S. 391 (1876) (oysters in Ware River). The fact here is that section 990 of the California Fish & Game Code does not draw the line between *citizens* and *aliens*—it draws the line between persons "ineligible to citizenship" and *all* other persons. The classification, therefore, consists of a distinction between two groups of aliens. Accordingly, it is entirely immaterial that this Court, when invalidating the Arizona statute in *Truax* v. *Raich*, 239 U. S. 33 (1915) which had denied aliens the right to work for a living in a common occupation, distinguished cases upholding statutes pertaining to "the common property or resources of the people of the State, the enjoyment of which may be limited to its citizens as against both aliens and the citizens of other States" (239 U. S. 33, 39-40). For in the present case, only some aliens —those "ineligible to citizenship"—are excluded; all other aliens, whether they reside in the State or not, are not excluded. We urge that such distinction between one alien and another alien is arbitrary and unreasonable, at least insofar as the regulation by a State of commercial fishing is concerned, and therefore constitutes a denial of the equal protection of the laws required by the Fourteenth Amendment of the Constitution.

Almost 68 years ago Circuit Judge Sawyer probed to the heart of the matter in an extraordinarily similar case. *In re Ah Chong*, 2 Fed. 733, 6 Sawy. 451 (C. C., D. Calif. 1880). The petitioners there, Chinese residents of California, sued out writs of *habeas corpus* after having been convicted for fishing "in San Pablo Bay, within the State" under a statute prohibiting fishing by "aliens incapable of becoming electors of the State." Circuit Judge Sawyer held (2 Fed. 733, 737):

> "To subject the Chinese to imprisonment for fishing in the waters of the state, while aliens of all European nations under the same circumstances are exempt from

> any punishment whatever, is to subject the Chinese to other and entirely different punishments, pains, and penalties than those to which others are subjected, and it is to deny to them the equal protection of the laws; contrary to" [the Fourteenth Amendment].

The present Supreme Court of California, in its decision below, brushed aside Circuit Judge Sawyer's 1880 decision and upheld the reasonableness of the distinction between persons "eligible" and those "ineligible" to citizenship, as applied to the regulation of commercial fishing, primarily on the basis of *Terrace* v. *Thompson*, 263 U. S. 197 (1923). That case held (at p. 220):

> (1) "Two classes of aliens inevitably result from the naturalization laws—those who may and those who may not become citizens. The rule established by Congress on this subject, in and of itself, furnishes a reasonable basis for classification in a state law withholding from aliens" a "privilege."
>
> (2) "It is obvious that one who is not a citizen and cannot become one lacks an interest in, and the power to effectually work for the welfare of, the state, and, so lacking, the state may rightfully deny him" a "right."

But it does not necessarily follow, merely because "two classes of aliens inevitably result from the naturalization laws", that the State of California may adopt that distinction for the entirely different purpose of permitting or denying persons the right to work for a living in the common occupation of commercial fishing. We need not here argue the question whether this distinction is constitutional in the naturalization laws. The fact, however, is that this discrimination in the naturalization laws has been assumed to be valid on the supposition that Congressional power over naturalization is unlimited. *Terrace* v. *Thompson*, 263 U. S. 197, 220 (1923); *Schneiderman* v. *United States*, 320 U. S. 118, 131-132 (1943). But even the Supreme Court

of California in its decision below admits that California's power to regulate commercial fishing is "subject to constitutional limitations against discrimination" (R. 36; 185 P. (2d) 805, 810). If California can constitutionally make racial discrimination with regard to this *limited* power merely because Congress makes racial discrimination with regard to the *unlimited* power over naturalization, then aliens "ineligible to citizenship" would have no constitutional protection against any possible discrimination which California might choose to impose on them. But would this Court ever uphold a State statute which provides that any person "ineligible to citizenship" who is charged with a crime shall be deemed guilty without trial?

Furthermore, it is unrealistic to attempt to justify California's use of the naturalization discrimination in section 990 by saying that "one who is not a citizen and cannot become one lacks an interest in, and the power to effectually work for the welfare of, the state." By the use of this naturalization classification, section 990 denies the right to earn a living in a common occupation, solely because of the accident of ancestry and place of birth, to persons who, like the petitioner in this case, had been lawfully admitted into the United States by authority of the Federal Government, have lived in California for many years, law abiding and participating in its community affairs, paying taxes, desiring to become citizens, and enriching the State and their community with their labor and their American children, many of whom served in the United States Armed Forces and some of whom now are members of the American Veterans Committee. At the same time, section 990 permits the issuance of commercial fishing licenses to other aliens who, although eligible to United States citizenship, have never been admitted by the Federal Government for residence in the United States, are not and have not been residents of California, have not participated in the com-

munal affairs of the State, and have no desire to become American citizens. Which one of these two groups most "lacks an interest in, and the power to effectually work for the welfare of, the State"?

Thus, the distinction in Section 990 between persons "eligible" and those "ineligible" to citizenship has no possible justification for application by the State of California to the regulation of commercial fishing, unless racial antagonism is a valid justification. Justices Murphy and Rutledge in their concurring opinion in *Oyama* v. *California*, 332 U. S. 633, 663-672 (1948) have shown the utter unreasonableness of the application of this distinction by the State of California in *any* manner to its lawful residents. Indeed, the very fact that the Federal government had admitted these Japanese-born persons for permanent residence anywhere within the United States along with other residents of the United States clearly negatives the reasonableness of a State classification which denies them the right to work for a living in a common occupation by fishing in the waters off California and bringing the fish ashore for sale, while permitting this to be done not only by citizens, but also by all other aliens, non-residents as well as residents of California and the United States. Since "Congress, in the exercise of its exclusive power over immigration . . . decided that certain Japanese, subject to Federal law, might come to and live in any one of the States of the Union . . . California should not be permitted to erect obstacles designed to prevent the immigration of people whom Congress has authorized to come into and remain in the country." Justices Black and Douglas, concurring in *Oyama* v. *California*, 332 U. S. 633, 649 (1948); *Truax* v. *Raich*, 239 U. S. 33, 42 (1915); *Chy Lung* v. *Freeman*, 92 U. S. 275 (1875). We therefore urge this Court to overrule *Terrace* v. *Thompson*, 263 U. S. 197 (1923), its companion cases, *Porterfield* v. *Webb*, 263 U. S. 225 (1923);

Webb v. *O'Brien*, 263 U. S. 313 (1923), and *Frick* v. *Webb*, 263 U. S. 326 (1923), and its offspring *Cockrill* v. *California*, 268 U. S. 258 (1925), insofar as these decisions, on the spurious basis that a State may reasonably apply this naturalization distinction, sustained state statutes making racial discriminations against people of Japanese origin lawfully residing in this country.

If California may here make an individual's eligibility to citizenship determinative of his right to engage in commercial fishing, it could by the same test qualify his right to engage in other occupations where the issuance of a license is required. It need not stop at occupations now licensed. It could also then condition the right to engage in *any* gainful occupation by requiring that a license be obtained and thus could successfully bar aliens of Japanese ancestry from all gainful employment by merely making them ineligible to secure any license whatsoever. In short, California could thus in effect overrule the decision of this Court in *Truax* v. *Raich*, *supra*, and deprive Japanese aliens of the protection of the Federal Constitution in their effort to earn a living, although they are lawful residents of this country.

II. The Racial Discrimination in Section 990 Violates a Treaty of the United States, Namely, the Charter of the United Nations, and Is Therefore Invalid.

The Charter of the United Nations is a treaty of the United States made and ratified under the Treaty power of the Constitution (Article VI) which provides that "all treaties made . . . under the authority of the United States, shall be the supreme law of the land; and the judges in every State shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding." Under the Charter, the United States has pledged to cooperate with the United Nations to "promote . . . universal respect for, and observance of, human

rights and fundamental freedoms for all without distinction as to race, sex, language, or religion." Articles 55(c), 56, United Nations Charter, 59 Stat. 1031, 1045-1046 (1945).

One of the most fundamental of all human rights and freedoms is the right to work for a living in a common occupation. *Truax* v. *Raich*, 239 U. S. 33, 41 (1915); *Butchers Union Co.* v. *Crescent City Co.*, 111 U. S. 746, 762 (1884); *Allgeyer* v. *Louisiana*, 165 U. S. 578, 589, 590 (1897); *Yick Wo* v. *Hopkins*, 118 U. S. 356 (1886); *Steele* v. *Louisville & Nashville R. Co.*, 323 U. S. 192 (1944); Revised Statutes, Sec. 1977, 8 U. S. C. 41; *In re Tiburcio Parrott*, 1 Fed. 481, 508 (C. C., D. Calif. 1880).

This right to work for a living is clearly one of the human rights and fundamental freedoms mentioned in Article 55(c) of the Charter of the United Nations. See January, 1946 issue of 243 *Annals of the American Academy of Political and Social Science* on "Essential Human Rights", pp. 13, 14, 23, 27-39, 41-42, 66; *United States Proposal for a Declaration of Human Rights* to Second Session of United Nations Commission on Human Rights, Articles 9 and 10, 17 Dept. of State Bull. 1075, 1076 (Dec. 7, 1947); *The Evening Star*, Washington, D. C., p. A-7 (Dec. 1, 1947); *Declaration on Human Rights*, adopted by United Nations Commission on Human Rights, December 17, 1947, Article 29, Press Release SOC/307 (17 Dec. 1947) by United Nations Dept. of Public Information, Press and Publications Bureau, Lake Success, N. Y.

Since Section 990 of the California Fish & Game Code denies to some persons, solely because of their racial ancestry, this "human right and fundamental freedom," which the Charter expressly states applies "for all" persons "without distinction as to race," the racial discrimination in Section 990 is plainly inconsistent with the Charter. Under Article VI of the United States Constitution, the supremacy of this Federal treaty provision over-rides "any-

thing in the . . . laws of any State to the contrary notwithstanding." *United States* v. *Pink*, 315 U. S. 203, 231-233 (1942); *Asakura* v. *Seattle*, 265 U. S. 332, 341 (1924); *Santovincenzo* v. *Egan*, 284 U. S. 30, 40 (1931); *Nielson* v. *Johnson*, 279 U. S. 47, 51-52 (1929); *Clark* v. *Allen*, 331 U. S. 507, 517 (1947). Indeed, this Court could not permit the continued enforcement of Section 990 without thereby itself violating the pledge of this Nation to "promote . . . universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race."

Conclusion

We respectfully urge that no statute should be upheld which denies to lawful residents, solely because of their race and ancestry, the right to work for a living in a common occupation and that the prohibition in Section 990 of the California Fish & Game Code against the issuance of a commercial fishing license to persons "ineligible to citizenship" should therefore be declared invalid.

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April 12, 1948.
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